United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1206

To be argued by
JEREMY G. EPSTEIN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1206

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIE WILLIAMS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1206

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIE WILLIAMS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Willie Williams appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on May 28, 1975, after a three-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 74 Cir. 205, filed February 28, 1975, charged Willie Williams in one count with attempted bank robbery in violation of Title 18, United States Code, Section 2113(a).

The trial commenced on April 21, 1975, and concluded on April 23, 1975, when the jury found Williams guilty.

On May 28, 1975, Williams was sentenced to five years imprisonment and is now serving that sentence.

Statement of Facts

Government's Case

Manufacturers Hanover Trust Company, located at 350 Park Avenue, was busy on February 18, 1975; about six people waited at each of the seven or eight teller's stations open that day (Tr. 13-14).*

Gary Stewart and Glen Mahon, mail clerks at the bank, were on the main banking floor so that Mahon could cash a check (Tr. 105, 135). Mahon waited sixth on a line directly behind Willie Williams. Stewart leaned against a pillar only two feet from Mahon (Tr. 106, 135). While waiting for Mahon, Stewart noticed Wiliams (Tr. 107-108). The teller for that particular line was Edna Rosa (Tr. 13, 40, 135).

When Williams' turn as a customer arrived, he stood before Rosa with a dollar bill in one hand and a piece of paper in the other. He said, "change this." Rosa inquired, "change what?" Williams responded, "this" and pushed forward, not the dollar bill, but the piece of paper (Tr. 40). Panorea Vidiakitis, the head teller, standing ten feet from Rosa also saw Williams pass the note (Tr. 16). Rosa had never before met Williams and there was nothing to suggest by Williams' demeanor that, when he passed the note, he was joking (Tr. 41).

The note read, "You are covered. Pase [sic]—the money" (Tr. 43; GX 2) but Rosa only recalled the words, "Pase . . . the money" (Tr. 52, 54). Rosa asked Williams whether she should put the money in an envelope (Tr. 44). Williams looked about the bank and did not respond to Rosa's question (Tr. 44-45). In the absence of a response

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* "Tr." refers to trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief.

Rosa decided to retrieve a larger container, a money bag, and then filled that bag with five, ten and one dollar bills (Tr. 45-46, 56-58).

While filling the money bag, Rosa simultaneously juggled the bag to the edge of her counter and, when the bag dropped to the floor, she dropped under the counter. She then pushed the bank alarm which activated three surveillance cameras on the banking floor (Tr. 16, 46-48).

Williams then left the bank without waiting for the money; twenty surveillance pictures recorded his departure (Tr. 141; GX 5-24). Vidiakitis saw Williams stand still for 10 to 15 seconds before he turned from the counter and walked out the bank's Park Avenue exit * (Tr. 17). As Williams left Vidiakitis grabbed a pen and pad and, while following Williams north on Park and west on 52nd up to the bank's 52nd Street entrance, recorded Williams' physical description (Tr. 19).

Mahon saw Williams full face both when Williams turned to leave and as Williams walked toward the bank's Park Avenue exit (Tr. 19, 136; GX 5-7, 15-19). When Mahon turned toward the teller station, he noticed for the first time that Rosa was hiding on the floor. He turned to Stewart, still standing by the pillar, and told him to "get the guy who just left" (Tr. 137). Stewart ran to 52nd Street and Park and there saw Williams head west on 52nd Street; Stewart chased him (Tr. 108). When Mahon saw Stewart chase Williams, he proceeded to follow him (Tr. 137-138).

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* The bank, located on the southwest corner of Park Avenue and 52nd Street has two entrances: there is the Park Avenue entrance already mentioned and, around the corner, on 52nd Street, a second entrance (Tr.10-11). The bank's glass windows run from floor to ceiling and extend north up Park Avenue and west across 52nd Street (Tr. 18, 137).

First Stewart, then Mahon caught Williams. Stewart asked Williams whether he had just left the bank on the corner, and Williams responded, "What bank? I don't know anything about a bank" (Tr. 109). In the presence of Mahon and Stewart, Williams repeatedly said, "I'm not the guy you're looking for" (Tr. 139, 151). Williams was then brought back to the bank and a surveillance camera recorded his return through the 52nd Street entrance (Tr. 109-111, 138-139; GX 25-26).

Mahon and Stewart brought Williams directly back to Rosa's station (Tr. 21, 48, 111-139). Rosa was asked by Mahon whether Williams was the man; she said he was (Tr. 20-21, 48). The dollar bill was still clutched in Williams' hand (Tr. 140).

Special Agent Michael McHale of the Federal Bureau of Investigation ("FBI"), alerted by radio, went to the bank and, upon his arrival, identified himself, placed Williams under arrest and read Williams his *Miranda* rights as set forth on the standard waiver form (Tr. 177, 179-181). Williams declined to make any statement without having a lawyer present (Tr. 182). Shortly thereafter, at FBI headquarters, Williams, similarly advised, again declined to make any statement in the absence of a lawyer (Tr. 182). However, while Williams was being fingerprinted, he said, "I did not rob any bank . . . I was only there to obtain change for a dollar bill" (Tr. 184).

Defense Case

On February 18, 1975, Special Agent Michael Kirchenbauer of the FBI, at FBI headquarters, advised Williams of his constitutional rights, apparently after Agent McHale had done so (Tr. 200-203). Subsequently, while McHale was fingerprinting Williams, Kirchenbauer also overheard Williams say that he went into the bank to get change for a dollar, and that he did not rob the bank (Tr. 204).

On March 17, 1975, Kirchenbauer showed three of the four eyewitnesses, Rosa, Stewart and Mahon, a single surveillance photograph. On that day each of the three was also shown a composite "mug" shot consisting of both full face and profile views of Williams.

ARGUMENT

POINT I

The introduction of testimony concerning Williams' refusal to answer questions upon arrest does not require reversal.

During his direct examination, Agent McHale, who questioned Williams after his arrest, stated that Williams had twice refused to respond to his questions and had stated that he wanted a lawyer (Tr. 182). Williams now argues that the admission of such testimony constitutes reversible error, even though his counsel failed to object, the trial judge gave a cautionary instruction *sua sponte*. and the testimony was extensively explored by Williams' own counsel during summation.

The government concedes, at the threshold, that the agent's testimony was improper and should not have been introduced. This hardly ends the inquiry, however, for we further submit that under all the circumstances it constituted harmless error and offered not the slightest prejudice to Williams' case.

The context in which the statement was introduced, and the subsequent use made of it is crucial to the determination of the prejudice arising from it. We therefore propose to examine the context with some care. Contrary to intimations in Williams' brief (Br. 12), defense counsel offered no objection whatever to the introduction of this testimony. Although he did request a bench conference

at the outset of this line of questioning (Tr. 179), his later remarks make clear that he was objecting only to the introduction of the exculpatory statement Williams made while he was being fingerprinted.* Prior to that objection, defense counsel had remained silent while the prosecutor elicited from the agent testimony about Williams' failure to answer; at no time did he suggest that he found the testimony objectionable as violative of his client's Fifth Amendment rights (Tr. 179-182).

Any conceivable prejudice which might have been occasioned by the agent's testimony was in any event minimized by the cautionary instruction given by Judge Cannella shortly thereafter:

> "I want to instruct the jury that the Miranda warning is a warning that was named after a case that was decided by the Supreme Court. A defendant or any person being interrogated has a right to be fully warned before he is questioned, and the fact that he does not answer any questions after he is given the warning may not raise any inference in your mind of any kind whatsoever. He has a right to refuse to answer. On the other hand, just as any human being has a right, he has a right to change his mind or do something else about it. This is a judgment you will have to make when you consider this part of the evidence. But the mere fact that he took advantage of the rights that he has is not to prejudice him in any way whatsoever at either time . . . (Tr. 191-192).

This statement, it should be noted, was delivered by the Court *sua sponte*, and not in response to a defense request for a cautionary instruction.

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* "Q. Did there come a time when the defendant said anything during fingerprinting?

MR. GUTMAN: Objection, your Honor. Now I do want a side bar" (Tr. 182-183).

Even more damaging to Williams' argument is the fact that defense counsel did not merely fail to object to the agent's testimony; he exploited it. He sought to use it, first in cross-examination and later in summation, in an apparent effort to suggest to the jury that the FBI agents had improperly badgered Williams. On cross-examination these questions were asked of Agent McHale:

> "Q. Did you question him further in the bank when he said he wanted a lawyer? A. Yes. I asked him for background information.
>
> Q. Even though he said he didn't want to talk to you without a lawyer? A. He said he didn't want to talk to me about the robbery of the bank without a lawyer present. I asked whether he'd give me information about himself and he said he would.
>
> Q. Did he sign the waiver forms? A. No, he did not" (Tr. 189).

Defense counsel emphasized Williams' refusal to answer questions because he apparently believed that the fact of Williams' silence somehow provided support for his argument to the jury that the single statement Williams did make was coerced.* It was therefore part of his strategy to emphasize Williams' refusal to answer, in an effort to call into question the voluntariness of the statement finally delivered. That strategy is manifest in the following excerpt from the defense summation:

> "But he says they come into the bank, he is confronted or introduced to Mr. Williams and he says you have a right to remain silent, Mr. Williams, you have a right to an attorney, Mr. Williams, you have a right to have an attorney appointed for you if you can't afford an attorney, we will get one for you. Do you want to discuss the robbery? There

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* Williams adduced no evidence, however, in support of his counsel's semantic contentions of involuntariness. See Points II and III, pp. 13-18, *infra*.

was no robbery. Do you want to discuss the robbery. Mr. Williams says no, I want a lawyer. Okay. Then they take him to FBI headquarters. The bank is on Park and 52nd. FBI headquarters is on 68th and 69th on Third. I will agree whichever. It is in the high sixties on Third Avenue. Mr. McHale says it took 45 minutes to get there. From 52nd and Park to 68th or 69th and Third. You have 17 blocks north, Park, Lexington, Third, two avenues. That takes 45 minutes. Let's leave it the way he says. They get him into the office, they know, he said to them, I want a lawyer. What do they do? Again, you have a right to remain silent, you have a right to a lawyer, you have a right if you can't afford a lawyer. Now do you want to discuss the case? He says no, I want a lawyer. They put him in a room, and Kirchenbauer now comes to him. You have a right to a lawyer, if you want a lawyer we will appoint a lawyer for you. Now do you want to discuss the case. He says no again. My God, how many times do you have to tell these agents that you want a lawyer? What was the necessity of constantly and repeatedly asking him do you want to discuss it. He said once, listen, I want a lawyer. There is nothing wrong with asking for a lawyer. How many times does he have to say it? And I assume that [if] it wasn't that late they would have asked him a fourth and fifth time, do you want a lawyer. Just eventually the guy would have said okay, leave me alone, what do you want" (Tr. 228-229).

The foregoing passage makes clear that, given the tactics employed, Williams desired to place before the jury the fact of his refusals to answer. Indeed, that fact was the only evidence which provided even an arguable basis for Williams' contention that the statement he did make was the product of an overborne will. Thus what the defense

employed at the trial as a necessary tactic it tries to portray on appeal as an error of constitutional magnitude. See *United States* v. *Skelley*, 501 F.2d 447, 455-456 (7th Cir.), *cert. denied*, 419 U.S. 1051 (1974).

In his brief Williams places considerable reliance on *United States* v. *Hale*, 43 U.S.L.W. 4806 (June 23, 1975), a recent Supreme Court decision that has little bearing on the instant case. *Hale* held only that a defendant's silence during a post arrest interrogation could not be used to impeach that defendant's testimony at trial. The Court emphasized, however, that its ruling was rooted in the rules of evidence and not in constitutional law. It held that silence could not necessarily be deemed inconsistent with exculpatory trial testimony and thus had little impeachment value. The Court balanced the probative value of the prior silence, which it deemed minimal, with its prejudicial effect, which it deemed substantial, and excluded the evidence on that basis. See *United States* v. *Wiley*, Dkt. No. 75-1082 (2d Cir., July 29, 1975) slip op. 5211, 5215 n.4.

Unlike *Hale*, the evidence of defendant's silence here was not used to suggest an earlier attitude inconsistent with his version of the facts at trial. More importantly, the evidence did have some independent probative value, which both the prosecution and the defense attempted to exploit. The fact of the defendant's refusal to answer was introduced to illuminate his state of mind at the time of his interrogation by FBI agents. A careful reading of Agent McHale's testimony discloses that the prosecutor sought to bring out, through this evidence, only that Williams was alert during his interrogation and fully cognizant of his rights. His prior refusal to speak made clear that Williams' subsequent statement was made freely and voluntarily, and was not the product of any misapprehensions concerning his rights or obligations. The defense, as has already been noted, sought to draw very different inferences from Williams' refusal: it argued that Williams' initial refusal to answer bespoke subsequent coercion when he finally did answer. Each side, then, thought the statement

to be of some probative value, and each sought to draw different inferences concerning Williams' state of mind from it.

Miranda v. *Arizona*, 384 U.S. 436 (1966) and the cases cited in Williams' brief based upon it establish that the fact of defendant's silence cannot be introduced to suggest consciousness of guilt. No such suggestion was advanced by the government here; as we have attempted to demonstrate above, the evidence was introduced for an entirely different purpose. We concede that the testimony should not have been elicited; once elicited, however, it was in no way exploited in the manner which the *Miranda* court deemed constitutionally impermissible. Moreover, the complete absence of any intimation by the prosecutor that Williams' refusals suggested consciousness of guilt does much to diminish the prejudicial impact of the testimony.

There is ample precedent for finding the admission of testimony such as that objected to here to be harmless error. In *United States* v. *Fairchild*, 505 F.2d 1378 (5th Cir. 1975), the government elicited through the testimony of a detective that the defendant refused to answer questions after being advised of his rights. Moreover, the prosecutor argued directly to the jury that his silence indicated consciousness of guilt.* The Fifth Circuit nevertheless refused to reverse the conviction for two reasons. First, it found that evidence of defendant's silence was properly admissible to rebut the defense argument that he had fully cooperated with law enforcement authorities. Second, the Court found

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* An excerpt from the prosecutor's summation appears at 505 F.2d 1383:

"But one thing is for sure, Mr. Alton Robert Fairchild wouldn't say a thing. He was confronted right out there with this proposition. . . . He was confronted right out there with the proposition that nothing matches up—silence. He wouldn't even tell them where he lived. They had to drag it out of him. Now, why is that? It's because he knew what was going on, ladies and gentlemen."

the admission of the challenged remarks to be harmless error in light of the strength of the evidence against the defendant and his counsel's failure to object. Other Courts have also found harmless error in the admission of testimony violative of defendant's Fifth Amendment rights if the strength of the government's case was such as to minimize the impact of any such testimony on the jury's verdict. See *Leake* v. *Cox*, 432 F.2d 982 (4th Cir. 1970); *United States* v. *Skelley, supra; United States* v. *Wick*, 416 F.2d 61 (7th Cir.), *cert. denied*, 396 U.S. 961 (1969); *Rothschild* v. *New York*, 388 F. Supp. 1346, 1349-1351 (S.D.N.Y. 1975).* See also *United States* v. *Beard*, 436 F.2d 1084, 1090-1091 (5th Cir. 1971).

None of the cases cited by Williams in his brief precludes a finding of harmless error, where appropriate, in cases where a defendant's Fifth Amendment rights were infringed; each, in fact, presents a situation where the infringement was far more egregious than it is in the present case. In *United States* v. *Semensohn*, 421 F.2d 1206 (2d Cir. 1970) and *United States* v. *Ghiz*, 491 F.2d 599 (4th Cir. 1974), defense counsel objected vigorously to the admission of testimony that defendant had remained silent after having been given his *Miranda* warnings. Here, of course, no objection was interposed. In *Ghiz*, furthermore, the Fourth Circuit distinguished *Boeckenhaupt* v. *United States*, 392 F.2d 24 (4th Cir.), *cert. denied*, 393 U.S. 896 (1968), in which the admission of testimony violative of the Fifth Amendment had been deemed harmless error. In *Boeckenhaupt*, the Court noted, there had been no objec-

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* In *Wick*, a counterfeiting case, the court found the objectionable testimony harmless because the government's evidence was "overwhelming", consisting of two positive identifications. The evidence in the instant case was of course far stronger: four bank employees positively identified Williams as the robber, and he was also depicted in 25 bank surveillance photographs.

tion raised to the testimony and the Court had promptly given a curative instruction.* *Boeckenhaupt* is far closer to the instant situation than *Ghiz*, and it warrants the conclusion that admission of the challenged testimony here was harmless error.

Finally, this Court has specifically acknowledged the possibility of harmless error in cases such as this. In *United States* v. *Mullings*, 364 F.2d 173 (2d Cir. 1966), a non jury trial, among the errors asserted was the admission of testimony that the defendant has remained silent when interrogated after his arrest. This Court recognized that the evidence was improperly admitted, and concluded that "[w]ere this the only error, we would be disposed to remand for reconsideration without this item of evidence, inasmuch as the case was tried to a judge; but other errors make that course impossible." 364 F.2d at 175. The mere admission of such testimony, therefore, does not require outright reversal; rather, it triggers a determination of the impact of the questioned testimony on the verdict. In a non-jury case, that determination can be made by the trial judge on remand; after a jury trial, determination must be made by this Court whether the admission of the testimony constituted harmless error. For all of the reasons previously advanced, we submit that the agent's testimony of Williams' initial refusal to answer questions had no impact whatever on the jury's verdict, and thus must be deemed harmless error.

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* Similarly, in *United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974), since vacated and remanded by the Supreme Court for reconsideration in light of its decision in *Hale*, 43 U.S.L.W. 3674 (June 23, 1975), this Court held that defendant's failure to object at trial to the evidence of his silence upon arrest precluded appellate relief on that ground. This Court further said that a curative instruction would usually suffice to render harmless any error in the admission of evidence of that kind.

POINT II

The trial court did not err in refusing to hold a hearing on the voluntariness of Williams' statement.

Williams contends that Judge Cannella erred in declining to hold a hearing on the question of the voluntariness of his statement to the FBI agents that he had been in the bank only to change a dollar bill. During the testimony of Agent McHale, defense counsel objected immediately prior to the mention of this statement and requested a bench conference (Tr. 182-183). Outside the presence of the jury, counsel requested a hearing on the voluntariness of the statement. The Court asked for an offer of proof from the government and then ruled that the statement was not the product of coercion and could be put before the jury (Tr. 183).

Given defense counsel's failure to make any showing that would require a hearing, and the lateness of the application, Judge Cannella's ruling was not improper. In his brief, Williams makes much of the trial court's supposed failure to comply with the requirements of 18 U.S.C. § 3501(a). He ignores, however, the settled law in this Circuit that a district judge is not required to hold an evidentiary hearing unless the movant makes a sufficient showing to raise a triable issue. *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970); *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960). No showing whatever was made by defense counsel here; he made no offer of proof regarding what, if anything, a hearing would demonstrate. Although Williams now argues in his brief that "appellant was in a position to provide testimony contradicting Agent McHale's version of the

facts" (Br. 15), there is not the slightest hint in the record that his counsel proposed such a showing below. If indeed Williams were prepared to testify that the statement was induced by trickery, coerced, or in some other manner defective, his counsel should have so informed the trial court. At that point, an evidentiary hearing would have been appropriate.

Although in his brief Williams argues strenuously that Judge Cannella ignored the mandate of § 3501(a), it is Williams who does not pay the statute sufficient heed. § 3501(a) requires that "the trial judge shall, out of the presence of the jury, determine any *issue* as to voluntariness." (Italics supplied). In this case, the defense simply failed to raise any triable issue. The clear implication of Williams' brief is that a trial judge is obligated to hold a hearing as to voluntariness simply upon the bald request of the defendant. That accords neither with the settled law of this Circuit nor with common sense.

Judge Cannella was further justified in refusing to hold a hearing in the midst of trial because the defense motion was not timely made. No motion for a § 3501(a) hearing was made prior to trial, and none was ever submitted in writing. This is in marked contrast to Williams' motion pursuant to *Simmons* v. *United States*, 390 U.S. 377 (1968), which was made prior to trial and was the subject of a lengthy hearing. The alacrity with which defense counsel objected makes clear that he was aware of Williams' statements prior to trial; there is therefore no reason why his motion could not have been made at the proper time. Judge Cannella thus could have denied the request with ample justification solely on the ground of untimeliness. *United States* v. *Dinneen*, 463 F.2d 1036, 1042 (10th Cir. 1972); *United States* v. *Freeling*, 31 F.R.D. 540 (S.D.N.Y. 1962).

POINT III

The trial court did not commit reversible error in omitting to instruct the jury on the issue of voluntariness.

Williams contends that reversal is mandated because Judge Cannella was required, but failed, to instruct the jury that it must make an independent determination regarding the voluntariness of Williams' statement. The contention is in error. Given the uncontradicted testimony conclusively establishing the voluntariness of the questioned statement, no voluntariness charge was required. Moreover, even assuming *arguendo* that such a charge was required, *United States* v. *Barry*, Dkt. No. 75-1060 (2d Cir., June 18, 1975), the Court's failure to give one was harmless error.

The district court was not required to present the issue of voluntariness to the jury because there was absolutely no evidence to suggest that the statement was involuntary. Agent McHale testified that Williams made the statement spontaneously, while he was being fingerprinted, and after he had been advised of his rights (Tr. 184). This testimony was fully corroborated by Agent Kirchenbauer, who was called as a defense witness (Tr. 204). Not only did the defense not call a single witness to contradict their accounts; defense counsel did not ask either agent on cross-examination even a single question about the circumstances under which the statement was made. The mere fact that earlier, during the course of his processing as an arrestee, Williams had on two separate occasions declined to answer questions in the absence of an attorney in no way supports the contention that his later spontaneous and gratuitously made statement was anything other than wholly voluntary. There was thus absolutely no evidence before the jury that Williams' statement was involuntary, and under such circumstances he was not entitled to a charge on voluntariness. *United States* v. *Anderson*, 394 F.2d 743, 747-748 (2d Cir.

1968); *United States* v. *Frazier,* 385 F.2d 901, 903 (6th Cir. 1967); *D'Aquino* v. *United States,* 192 F.2d 338, 356 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952).

Furthermore, even if a voluntariness charge could be said to have been required under *Barry,* its omission here was harmless error. In *Barry,* as here, the district court's charge did not present the issue of voluntariness to the jury. That omission *per se,* however, did not require reversal. This Court observed:

> "Our finding that the district court's charge was inadequate does not conclude our inquiry. We should not order a new trial unless the plain error in the instruction caused sufficient prejudice to the defendant to justify vitiating the jury's verdict. *United States* v. *Birnbaum,* 373 F.2d 250, 257 (2d Cir. 1967), *cert. denied,* 389 U.S. 837. The yardstick by which prejudice must be measured is our appraisal of the impact of the error on the jury. *Kotteakos* v. *United States,* 328 U.S. 750, 704-65 (1946). But, as *Kotteakos* suggests, a court should be quick to perceive prejudice 'where the departure is from a constitutional norm or a specific command of Congress.' *Id.* at 764-65." Slip opinion at 4127.

Some attention must therefore be given to the impact of the defendant's statement on the jury, and its importance to the government's case. In *Barry* this Court concluded that the defendant's confession was a critical aspect of the government's proof; without it, all that established the defendant as a drug trafficker was the unsupported testimony of an accomplice who was awaiting sentence. This Court therefore concluded that the potential impact of the confession on the jury's deliberation was sufficiently severe as to require reversal.

The facts of the case at bar could not be further removed from *Barry.* The statement here was not a full con-

fession but a one sentence exculpatory exclamation. It could hardly be deemed crucial evidence of the defendant's guilt in the face of four eyewitness identifications and bank surveillance photographs. Its principal probative value was as additional proof that Williams was in the bank at the time of the robbery. And while Williams' brief appears to assume that this was a critically contested issue at trial, a more careful review of the record discloses that Williams' presence in the bank at the time of the robbery was conceded by his counsel:

> "The question now is these photographs. You saw all these photographs. I submit to you ladies and gentlemen that these photographs have nothing to do with this case. They don't show Mr. Williams passing the note. They don't even show Rosa in the pictures. *What do they show. They show that at some point Williams was in the bank. Williams was in the bank.* There are other photographs, there are other people in the bank. Why can't one—there are so many people in each photograph. Why isn't one of them charged with it? What makes the difference here is whether you were on line or whether you weren't on line. Glen Mahon, Gary Stewart, Rosa all said that there were at least six people on line. Why does it necessarily follow that because there are six people on line and Mr. Williams is the last man and the pictures start going off or being taken at that point that he is necessarily the man that passed the note? Doesn't follow logically—*These pictures show Williams in the bank and Williams being brought back.* How far apart in time are they? Nobody knows. Could they be a half hour apart? Could the one part of the pictures have been taken with a different camera than the other part? Was Mr. Williams in there more than once? Was there any testimony that he could have been in there three times that morning. Could have been in there for change. These pictures have no bearing on the ques-

> tion of whether it was Mr. Williams who handed the note to Rosa. Rosa is not in the pictures. (Italics supplied) (Tr. 233-234).

An examination of the entire summation reveals that the defense chose to contest only two issues: (1) whether, given Williams' presence in the bank, it was he who passed the demand note to the teller; and (2) assuming he did pass the note, whether that constituted an intimidation of the teller. Because the issue of Williams' presence in the bank was not contested, the implicit concession in Williams' statement to the FBI agents that he was in the bank was of little importance to the government's case and could have had no conceivable impact on the jury's verdict. Proper adherence to *Barry* requires that the court's failure to give a voluntariness instruction be deemed harmless error.

POINT IV

The trial court did not improperly comment on the evidence.

Williams finally contends that Judge Cannella improperly commented on the evidence. In support of that contention he cites three sentences from the Court's charge (Br. 17) which have been wrenched out of context. The entire relevant portion of the charge reads as follows:

> "An exculpatory statement made by the defendant, in this area there is [sic] really two of them that have been referred to or that could be considered as exculpatory statements.
>
> The first one was when they caught up with him at 52nd Street and the door and he said not me, I wasn't in the bank, or something to that effect. And then the other one is when he was in the FBI office and they were fingerprinting him, he said I went into the bank but I only went in to change a dollar. By

> the way, if that is a fact, where is the change to the dollar. How did he wind up with the bill out on 52nd Street if he went in to change a dollar as he said he did. Because he still had the dollar when they picked him up.
>
> In any event, those are in the nature of exculpatory statements. *If you believe they are* false, then you may determine that the defendant has consciousness of guilt and he knows that he did something wrong and that he is using this statement to exonerate himself and possibly get off. *That is a judgment for you to make, and you do that in evaluating the evidence*" (Italics supplied) (Tr. 279-280).

This passage, considered in its entirety, indicates that the trial court did not improperly comment on the evidence. He made it clear that the determination of the truth or falsity of the defendant's statement and the significance of any such finding were matters for the jury's determination. Nor can this passage be viewed in isolation. It is axiomatic that the fairness of a trial judge's charge must be considered "in the context of the whole trial record, particularly the evidence and the arguments of the parties." *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). See also *United States* v. *DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974). An examination of Judge Cannella's instructions *in toto* discloses that he did not foreclose a single material fact from the jury's determination. At the very outset of his charge he reminded the jury that it was their recollection of the facts that controls, not his. He further instructed them that they were the "sole and sovereign judges of the facts" and of the credibility of witnesses (Tr. 207-208).

The passage from *Tourine* to which Williams alludes (Br. 17) permits judicial comment on evidence "so long as the trial judge does not by one means or another try to impose his own opinions as to the facts on the jury and

does not act as an advocate in advancing factual findings of his own." 428 F.2d at 869. No fair reading either of the entire charge or even of the supposedly offending passage yields the conclusion that Judge Cannella acted here as an advocate.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

John P. Flannery being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of August, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Jack Hipson, Esq
Legal Aid Society, Rm 509
Federal Defenders Services Unit
U.S. Courthouse
Foley Square
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John P. Flannery

Sworn to before me this
20th day of August, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977